83-6260

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHAEL TRAVAGLIA
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

686 Criminal, 1980

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE UNITED STATES
OF AMERICA

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Greensburg, PA 15601

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JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on September 29, 1983 (Appendex A, infra, pp. Request and re-argument was timely made and same was denied without opinion on December 14, 1983. The jurisdiction of the Cou-t is invoked under Title 28 U.S. C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commonwealth of Pennsylvania's Death Penalty Sentencing Statute, 42 Pa. C.S.A. Section 9711, is involved. Pertinent portions of this statute are set out in Argument IV in the body of the certiorari, infra pages

Amendment VIII to the United States Constitution is involved.

Amendment XIV to the United States Constitution is involved.

STATEMENT OF THE FACTS

The defendant, Michael J. Travaglia, was arrested on January 3, 1980, in downtown Pittsburgh. He was arrested, along with a co-defendant, John Lesko, in a hotel room which was entered by force by the Pittsburgh Police. Because of the nature of this case, there was substantial publicity surrounding the matter. On June 2, 1980 the Commonwealth called the case for trial and a voir dire was conducted. After the questioning of 30 potential jurors, Judge Gilfert Mihalich, presiding, granted defense counsel's Motion for a Change of Venue.

A second trial was scheduled to begin in Dauphin County, Pennsylvania, for the purpose of selecting a jury and transporting the panel back to Westmoreland County for the Trial, on September 3, 1980. On September 12, 1980, after seven days of questioning a mistrial was declared by the Trial Judge due to the jury panel being tainted by knowledge of the case as a result of the pre-trial publicity.

Change of Venue was granted once again, with the jury selection process scheduled to begin in Berks County, on January 5, 1981. A jury empaneled in Berks County, on January 5, 1981. the Trial actually commenced in Westmoreland County on January 21, 1981, and lasted until February 3, 1981. On January 30, 1981, the jury found the defendant guilty of Murder of the First Degree. After a sentencing hearing, the jury on February 3, 1981, imposed a penalty of death. Defendant appealed to the Supreme Court of Pennsylvania, and that appeal was denied. Defendant now appeals to the Supreme Court of the United States of America.

This case raises the issue of whether the Trial Court erred in excluding certain veniremen, specifically, prospective juror No. 19, Ester Kroh? After being accepted by the defense for both defendants, the Commonwealth challenged for cause (V.D.T. 261). After some discussion the Court granted the

challenge (V.D.T. 262). The exclusion of this juror is improper for two reasons. The first is that, by accepting the juror initially, the Commonwealth waived all subsequent challenges for cause. For the Trial Court to sua sponte exclude the juror was a flagrant abuse of discretion. The second reason for err on this issue is that the determination was never properly arrived at as to the qualifications of Ms. Kroh (V.D.T. 263).

This case next raises the issue of whether the Trial Court erred by allowing the prosecution witness, Ricky Rutherford, to testify about another crime in which the defendant, had been involved. (TT. 339-417) Rutherford testified, over defense counsel's objections, about a crime that had occurred earlier. Rutherford states that earlier that evening, defendants Travaglia and Lesko had abducted a Mr. Nichols. Nichols was driven to Indiana County, from Pittsburgh, beaten, tied, and drowned by being thrown into an icy lake. This crime took place several hours earlier than the crime in question, in a different County, at least twenty miles away. The prosecution presented extremely prejudicial gory details of this offense also over defense counsel's objection. (T.T. 363).

Defendant argues that generally, absent special circumstances, the Commonwealth cannot introduce evidence of a different crime committed by the defendant because the commission of one crime is not proof of the commission of another, and because such evidence is so prejudicial that it strips a defendant of the presumption of innocence.

This case next raises the question of whether the Trial Court erred in allowing into evidence as an aggravated circumstance for sentencing purposes, a prior guilty plea to the Homicide in Indiana County, when that plea did not constitute a conviction. Defendant argues that the language in the sentencing statute states that a "conviction" is

necessary before it constitutes an aggravating circumstance, not a guilty plea or a verdict of guilt and that all the prior case law in the Commonwealth specifically held that there is no "conviction" until sentencing. The Trial Court was premature in permitting testimony of the plea, depriving the defendant or right to due process under the Constitution of the Commonwealth and the Constitution of the United States.

The case next raises the question of whether imposition of the death penalty pursuant to 42 Pa. C.S.A. Section 9711 violates the prohibition against cruel and unusual punishments contained in the Eighth Amendment of the United States Constitution. Section 9711 violates the Eighth Amendment prohibition against cruel and unusual punishments because it mandates a sentence of death upon a finding by the sentencing jury of one aggravating factor and no mitigating factors.

Finally, the last question raised is whether the Pennsylvania Supreme Court erred in its interpretation of the aggravating circumstances in this case by ruling that the Pennsylvania Death Penalty Statute did not permit a circumstance for consideration, sympathy for the actor, thereby making the Pennsylvania Death Penalty Statute unconstitutional? (V.D.T. 1712, 1713) Defendant argues that the United States Supreme Court expended the Lockett rationale in Death Penalty cases wherein it was decided that the sentencer is required "to listen" to any mitigating evidence presented by the defendant. Eddings vs. Oklahoma, 102 S.Ct. 869(1982). Because the concept of relevant mitigating circumstances is so flawed, requiring death unless relevant mitigating circumstances are found - - the essence of the Pennsylvania mandatory scheme - - fails to satisfy the Supreme Court's insistence upon a reliable Death Penalty sentencing system.

ARGUMENTS

I. DID THE TRIAL COURT ERR IN EXCLUDING CERTAIN VENIREMEN, SPECIFICALLY, PROSPECTIVE JUROR No. 19, ESTHER KROH?

ANSWER: YES

In potential death penalty cases, it is error for the court to improperly exclude a single venireman from serving on the jury. Davis vs. Georgia, 429 U.S. 122 (1976) enunciates this principle by stating that, "Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings', he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." 429 U.S. at 123 (emphasis added).

That standard on jury selection in death penalty cases extends from the rationale used in the case of Witherspoon vs. Illinois, 391 U.S. 510 (1968). That case struck down the then-existing Illinois death penalty statute. The Supreme Court ruled that the death penalty may never be carried out

> ". . . if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its inflicting. No defendant can constitutionally be put to death at the hands of a tribunal so selected". 391 U.S. at 522-23.

While there were a number of potential jurors excluded improperly prior to a full determination that their vote against the death penalty would be automatic, the voir dire of Juror No. 19, Esther Kroh, is the most glaring example of the trial court's improper exclusion of jurors. Again, the cases are specific; the improper exclusion of a single venireman constitutes reversible error. See Davis vs. Georgia, supra.

Esther Kroh was initially examined by the Commonwealth. (VDT. Vol. I 253-264). Though elderly, she exhibited no overt difficulty in understanding and promptly responding to the

questions. After the Commonwealth appeared satisfied she would consider the evidence prior to voting for or against a death penalty (VDT Vol. I 256), she was accepted (VDT Vol. I, 258). The questioning by defense counsel revealed that she did have some opposition to the death penalty (VDT Vol. 260), however, at no point was she asked if she were 'irrevocably committed' to her viewpoint, nor did she ever express even an inclination to vote automatically against the death penalty. In fact, at a point during the Commonwealth's questioning, she stated she could vote either way, depending upon the evidence(V.D.T.Vol.I) 256).

After being accepted by the defense for both defendants, the Commonwealth challenged for cause. After some discussion the Court granted the challenge.

The exclusion of this juror is improper for two reasons. The first is that, by accepting the juror initially, the Commonwealth waived all subsequent challenges for cause. For the trial court to sua sponte exclude the juror would be a flagrant abuse of discretion. The second reason for reversal on this issue is that the determination was never properly arrived at as to the qualifications of Ms. Kroh. Much to the consternation of the prosecutors, they did not ask their questions with sufficient clarity. Furthermore, even assuming follow-up questions by the court are proper, the court never asked the determinative question, "Are you irrevocably committed to voting against the death penalty?" Anything short of an affirmative response to that question qualifies this juror.

The Judge stated that "Under the situation as observed and determined by this Court, this juror is not qualified to serve." It is assumed that the juror's equivocation on the imposition of the death penalty was the reason for dismissal, because no other reasons for a challenge surfaced during questioning. In the case of State vs. Aiken, 75 Wash. 2d 421, 452 P.2d 232 (1969), the Washington Supreme Court faced the question of

how clear the statement by the juror on commitment against the death penalty must be before that juror can be excluded. Jurors were asked, ". . . could you bring yourself to vote for the death penalty?", and the juror answered, "I don't think I could." Another juror answered, "No, I don't think that I could". Another answered "I don't believe I could, sir." The Washington Court found these answers "clearly amounted to definitive answers to the crucial questions, despite the fact that their responses were not stated as positively and as forcefully" as those of some of the other excused veniremen. State vs. Aiken, supra, 452 P.2d at 236. The decision in that case relied on the idea that the judge could utilize his observation, and in his discretion make a determination. State vs. Aiken, supra at 237. In Aiken vs. Washington, and Wheat vs. Washington, 403 U.S. 946 (1971), the Washington decision was reversed, in that the mandate of Witherspoon vs. Illinois, 391 U.S. 510 (1968), which states that:

> ". . .(veniremen) cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment, and a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a veniremen in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed before the trial had begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir that veniremen were excluded on any broader basis than this, the death penalty cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." 391 U.S. at 522 Note 21.

Esther Kroh was never asked if she were 'irrevocably committed' to her view in opposition to the death penalty. She was never asked if she would automatically vote against the death penalty. She was never asked if she would automatically vote against the death penalty, irrespective of the evidence.

She expressed her opposition to the death penalty, but never expressed the unequivocal committment necessary for

a challenge for cause. (VDT Vol. I page 260-261). She was improperly excluded by the trial court, and the death penalty should not be imposed.

Other prospective jurors were excluded improperly, without responding with the clear, unequivocation necessary prior to a challenge for cause due to their views on the death penalty. Jurors No. 40, Mr. Fishburn; No. 81, Mr. Bates; No. 82, Mrs. Reber; No. 105, Mrs. Ebersole; No. 120, Mrs. Wunder; No. 158, Ms. Mohn were all excused without expressing the proper, unequivocal committment against the death penalty. Ms. Kroh, however, stands out as the most glaring example of the trial court's error on this issue.

Witherspoon vs. Illinois, Supra, 391 U.S. 510 (1968), states that,

> "Whatever else might be said of capital punishment, it is at least clear that that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the Petitioner. To execute this death sentence would deprive him of his right without due process of law." 391 U.S. at

The improper dismissal of certain veniremen, specifically, prospective Juror No. 19, Ester Kroh, amounts to the violation of Appellant's constitutional right to due process

II. DID THE TRIAL COURT DEPRIVE DEFENDANT OF HIS RIGHT TO DUE PROCESS BY ALLOWING THE PROSECUTION WITNESS, RICKY RUTHERFORD, TO TESTIFY AS TO CRIMINAL ACTS OF THE DEFENDANT WHICH WERE NOT INCLUDED IN THE CRIMES CHARGED AT BAR?

ANSWER: YES

During the trial, the prosecution called Ricky Rutherford, a co-defendant, to the stand. Rutherford's testimony (TT 339-417) involved the evening of January 2, 1980, and the morning of January 3, 1981.

As the only witness to the shooting of Officer Miller, aside from the co-defendant's Rutherford's testimony setforth the Commonwealth's theory of how and why that shooting occurred. His testimony was that the police car, seen by the driver Travaglia parked in a lighted lot, was enticed into following them. The defendant's car sped by the police car at a high rate of speed, then returned past the officer again at a high rate of speed up a hill back in the direction from which the defendants had originally proceeded. The defendant then turned the car around, sped down the hill and past the police car. The car was driven over a bridge, towards the county line one-quarter mile away. Seeing that the police were still in pursuit past the county line, the defendant stopped. The shooting then took place.

Rutherford then testified, over defense counsel's objections, about a crime that had occurred earlier. Rutherford stated that earlier that evening, defendants Travaglia and Lesko had abducted a Mr. Nichols. Nichols was driven to Indiana County, from Pittsburgh, beaten, tied and drowned by being thrown into an icy lake. This crime took place several hours earlier then the crime in question, in a different county, at least twenty miles away. The prosecution presented gory details of this offense also over defense counsel's objection.

"Generally, absent special circumstances, the Commonwealth cannot introduce evidence of a different crime committed by the defendant because the commission of the one crime is not proof of the commission of another, Commonwealth vs. Roman, 465 Pa. 515, 351 A.2d 214(1976); Commonwealth vs. Fortune, 464 Pa. 367, 346 A.2d 783(1975); Commonwealth vs. Bastone, 262 Pa. Super.

590, 396 A.2d 1327 (1979), and because such evidence is so prejudicial that it strips a defendant of the presumption of innocence." Commonwealth vs. Brown, Pa. _____ 421 A.2d 734.

The Commonwealth argued that the tesitmony of another crime should be allowed in that it was relevant to the intent and motive of the co-defendants in shooting the officer. While it is true that in special circumstances, evidence of other crimes may be admitted, the exception to the general rule is applied extremely cautiously. In Commonwealth vs. Roman, supra, at 218 sets forth that:

> "One of the special circumstances operating as an exception to the general rule, under which evidence of a distinct crime may be introduced against a defendant, is that situation where the proferred testimony tends to establish defendant's motive for the crime, Commonwealth vs. Schwartz, 445 Pa. 515, 285 A.2d 154 (1971); Commonwealth vs. Coyle, 415 Pa. 379, 203 A2d. 782 (1964); Commonwealth vs. Ferrigan, 44 Pa. 386 (1863). However, to be admissible under the above exception, evidence of a distinct crime, even if relevant to motive, "must give sufficient ground to believe that the crime currently being considered grew out of or was in any way caused by the prior set of circumstances "Commonwealth vs. Schwartz, supra, 285 A.2d at 158."

In the instance case, the Commonwealth theory is that, to avoid detection of the prior crime, the defendants shot Officer Miller. The facts as submitted by the Commonwealth's own witness, however, do not unravel such a plan. On the contrary the high speed taunting by the defendant Travaglia shows a complete disregard for detection or concealment of identity. Absent some causal proof of connection, this devastating information should not be allowed.

It must be pointed out that the Pennsylvania Supreme Court's premise of why this evidence is admissible is erroneous. Their opinion states that the Commonwealth must be permitted to use evidence of the other crime to refute the Defendant's theory of accident, "that Travaglia's finger had slipped from the gun's hammer". (Page 18 of Pa. S. Ct. Opinion). Accident was not

defendant's defense in this case, although he had claimed the shooting was accidental in his initial statement to police. Mr. Travaglia's defense was one of diminished capacity, which admits culpability, denying specific intent.

The recent case of Commonwealth vs. Shain, 426 A.2d 589, 1981, states that:

> "merely because the Commonwealth had a theory of motive, that theory in and of itself is not sufficient to submit it to the jury for their consideration. Evidence of motive must be competent evidence that is supported by the record and facts. Evidence of motive in this case was through argument and not through testimony."

It is evident from a review of the record that there is no evidence whatsoever to support the Commonwealth's theory as to motive or intent. What the admission of these other crimes evidence does show is the defendant's propensity for violent behavior, a wickedness and a cruelty sure to inflame the most objective juror. Aggravating the prejudice is the fact that the trial court allowed, over objection, testimony in great and lurid detail of how the abduction and drowning of Nichols took place The punching, the insults, the bounding and gagging, the tying of rocks to weight the body down were all included in testimony. The theory the Commonwealth purported to prove was lost on the jury; the stinging inflammatory effect of this testimony was not. The Commonwealth's goal of depriving the defendant of a fair trial by depicting him as a cold-blooded, violence prone individual was accomplished. The objectionable testimony of Rutherford summed up what the Commonwealth succeeded in having the jury believe when he was asked, "How were they acting when they said this?" and he responded, "Like something they did all of th time". (TT 367). The presumption of innocence was lost after Rutherford's testimony. The effect of that testimony on even the most objective juror is so prejudicial that any notion of the defendant receiving a fair trial on the crime at issue is gone. As stated in Commonwealth vs. Groce, 452 Pa. 15, 19, 303 A.2d 917, 919 (1973), "The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused

guilty, and thus effectually to strip him of the presumption of innocence."

The breakdown of the rule disallowing evidence of "other crimes" occurs only under extreme and limited circumstances. The causal link of another crime used to prove the crime at issue should be very clear, because in admitting the evidence, the court jeopardizes the presumption of innocence. The canon that commission of one offense is not proof of the commission of another is "One of the most fundamental and prized principles in the administration of criminal law." Commonwealth vs. Burdell, 380 Pa. 43, 47, 110 A.2d 193, 195. The need for adherence to that principle was seen in this case.

Furthermore, it was totally unnecessary and prejudicial to allow all of the gruesome details of the other crime. The Commonwealth's theory, if proper, could have been satisified by testimony limited to the fact that a car had been stolen and another assault had taken place. The shocking details of the prior incident shroud any motive theory and placed the defendant on trial for the drowning death, not the shooting of the police officer.

In summary, "Evidence of prior criminal activity. . . is probably only equalled by a confession in its prejudicial impact upon a jury. Thus, fairness dictates that courts should be ever vigilant to prevent the introduction of this type of evidence under the guise that it is being offered to serve some purpose other than to demonstrate the defendant's propensity to commit the charged crime. An additional reason why we caution trial courts against being innovative in carving out new exceptions to the rule is that evidence of prior criminal activity requires the defendant to answer charges which were not included in the indictment returned against him. Where the testimony is admissible under the traditional exceptions counsel for an accused can anticipate its introduction and thus prepare a response. Where a novel exception proved the basis for the entry of such testimony, the appellant cannot reasonably be expected to meet it. In the latter case, serious due process citations are raised."

Thus, the trial court should not strain logic, nor entertain suggestions (as in the Commonwealth's brief) that the rule of law against admitting such evidence is obsolete, so that this evidence can be admitted especially in a case were the introduction of the offense is based upon a theory that has no foundation in fact from the Commonwealth's own witness and can at best be an after the fact supposition. Nowhere, not even in defendant's confession obtained after interrogation and Rutherford's statement, which the Commonwealth obtained long prior to trial, is the Commonwealth's conjectural theory. The case for its entry, in terms of support for the Commonwealth's theory, was not so clear as to allow the evidence's devastating impact to effect the jury.

The trial court deprived defendant of his right to due process under the Constitution of the Commonwealth of Pennsylvania and United States by allowing testimony as to criminal acts of the defendant which were not included in the crimes charged at bar and which tends not to establish defendant's intent or motive and/or the shooting.

III. DID THE TRIAL COURT ERR IN ALLOWING INTO EVIDENCE AS AN AGGRAVATED CIRCUMSTANCE FOR SENTENCING PURPOSES, A PRIOR GUILTY PLEA TO A HOMICIDE IN INDIANA COUNTY, WHEN THAT PLEA DID NOT CONSTITUTE A CONVICTION?

ANSWER: YES

After the jury had returned their verdict of guilt of first degree homicide against the defendant, the sentencing phase of the trial was commenced. During that portion of the trial, the Commonwealth was permitted to enter testimony to the effect that, even though the Court had not sentenced the defendant, he had pled guilty to second degree homicide prior to the commencement of the trial in another county. The Commonwealth argued that this was a conviction within the requirements of 18 Pa. C.S. A. Section 1311, the statute for sentencing in death penalty cases.

At the outset, it should be noted that the language contained in the Pennsylvania Rules of Criminal Procedure indicates that the judgment, or conviction, is not final until a sentence is pronounced. Rules 320 and 321 read in pertinent part.

> Rule 320. Withdrawal of plea of guilty at any time before sentence, the Court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted.
>
> Rule 321. Challenge to guilty plea
> a) A motion challenging the validity of the guilty plea shall be in writing and shall be filed with the Court within ten days after imposition of sentence.

Thus, under the rules there is no judgment of record until after the sentence.

This issue does not appear to have been addressed specifically by the Courts in Pennsylvania. However, the Courts have rules that counsel was ineffective for bringing up prior convictions where sentence had not yet been imposed, because they were not grounds for impeachment as conviction was not final, Commonwealth vs. Zapata, Pa. 314 A.2d 299 (1974); that a person could not be disqualified as a witness under the Disqualification Act, 19 P.S. Section 62, until a final conviction, or sentencing, and the District Attorney improperly delayed sentencing because he knew only sentencing would seal the conviction, Commonwealth

vs. Johnson, Pa. ____, 403 A.2d 87 (1979); that prior convictions may be used to impeach a defendant's credibility only if sentence had been imposed for those convictions, Commonwealth vs. Finkelstein, 191 Pa. Super., 328, 156 A.2d 888 (1959); upheld as to criminal defendant in Commonwealth vs. Zapata, supra at 302. Therefore, it is apparent that in this Commonwealth sentencing finalizes the matter for the record.

Commonwealth ex. rel. McClenachan vs. Reading, 336 Pa. 165(1939), states:

> In interpreting a statute using the word 'conviction' the court has held that the strict legal meaning must be applied except where the intention of the legislature is obviously to the contrary: Commonwealth vs. Minnich, 250 Pa. 363.

"Convicted", then, requires final judgment by the Court, i.e. sentencing. It has been held repeatedly that a verdict of guilty may not be appealed that it is premature that the appeal is from the judgment of sentence.

It is interesting to note that the Commonwealth at one point argued this very matter, during the trial, that a conviction is not final until sentencing. In arguing that admissions to other crimes would be admissible in the Miller homicide because no conviction was entered, they submitted a brief stating "defendant's pretrial admissions of other crimes are not inadmissible because they have not already been convicted and sentenced on them." The defendant respectfully agrees with the portion of the Commonwealth's brief.

In deciding the issue of what constitutes a conviction for the purposes of the death penalty statute, the Supreme Court of Pennsylvania created an exception from the previously accepted definition of 'conviction', by their opinion. In stating, "By including offenses committed contemporaneously with the offense at issue, the legislature clearly indicated its intention that the term 'convicted' not require final imposition of sentence, but cover determinations of guilt as well." This Court's opinion creates an exception which is to be applied, apparently, only in captial cases.

This change in the law, however, creates due process problems. Relying on the law in effect at the time of the plea in Indiana County, Pennsylvania, as to what constitutes a "conviction" (which was stated by the Indiana County judge the day the guilty plea was taken), Appellant entered his plea. Had the definition of "conviction" for captial cases been stated then as it has been since, there remains the distinct possibility that Appellant would have been chosen not to enter his plea.

In summary, the language of the sentencing statute states that a "conviction" is necessary before it constitutes an aggravating circumstance, not a guilty plea or verdict of guilt. The trial court was premature in permitting testimony of the plea, depriving the defendant of his right to due process under the Constitution of the Commonwealth and the Constitution of the United States.

IV. WHETHER IMPOSITION OF THE DEATH PENALTY PURSUANT TO 42 PA C.S.A. SECTION 9711[1] VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS CONTAINED IN THE EIGHT AMENDMENT OF THE UNITED STATES CONSTITUTION?

ANSWER: YES

A. SECTION 9711, VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS BECAUSE IT MANDATES A SENTENCE OF DEATH UPON A FINDING BY THE SENTENCING JURY OF ONE AGGRAVATING FACTOR AND NO MITIGATING FACTS.[2]

Section 9711 controls the sentencing procedure for murder in the first degree in cases in which the Commonwealth seeks the death penalty. Once a verdict of murder in the first degree is recorded, a sentencing jury,[3] hears evidence of "aggravated circumstances" and "mitigating circumstances." The sentencing jury determines, on the basis of this evidence, whether the sentence shall be death or life imprisonment.

The jury's discretion to impose a sentence of life imprisonment is sharply limited, however, by Section 9711(c)(iv), which makes a sentence of death mandatory if the jury finds at least one aggravating circumstance and no mitigating circumstance. Section 9711 (c)(iv) provides in part as follows:

> (T)he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance. . .(emphasis added).

Thus, for example, if a sentencing jury finds that a first degree murder occurred during the perpetration of a felony, which aggravating circumstance number 6,[4] and finds no mitigating circumstance, the sentence must be death.

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[1]Act of September 13, 1978, P.L.756, No.141 Section 1, transferred from 18 Pa. C.S.A. Section 1311 by Act of October 5, 1980, P.L. 693, No.142, Sec.142, Section 401(a).

[2]The defendant has standing to challenge facial invalidity of the death penalty statute regardless of the specific application of the defect to this case. See Commonwealth vs.Moody, 476 Pa.223,234 382A.2d442,450(1977), cert.denied,438U.S.914.

[3]In a jury trial, the sentencing jury will be the same jury that found the defendant guilty. In the circumstance of a non-jury trial or a plea of guilty, a sentencing jury is impaneled specifically. See 42 Pa.C.S.A. Sec.9711 (b).

[4]42 Pa.C.S.A. Section 9711(d)(6).

Section 9711(c)(iv) does not permit the sentencing jury to decide whether the aggravating factor present in a particular case justifies the imposition of death. In such a case, Section 9711 is mandatory. The Appellant must die even though the sentencing jury might feel that life imprisonment is the appropriate penalty.

B. MANDATORY DEATH PENALTY STATUTES ARE UNCONSTITUTIONAL BECAUSE A SENTENCING JURY MUST HAVE DISCRETION TO MAKE AN INDIVIDUALIZED DECISION ABOUT THE APPROPRIATENESS OF DEATH IN EACH DEATH PENALTY.

The concern that the decision to impose the death penalty reflect an individualized assessment of the appropriateness of death for the particular crime and the particular defendant, has led the Supreme Court to invalidate mandatory death penalty schemes on the ground that "it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence."

Section 9711 does permit consideration of a broad rarge of mitigating factors. See 42 Pa. S.C.A. Section 9711(e)(8). Nevertheless, the mandatory sentencing scheme in Section 9711 does not permit the jury to consider whether the aggravating circumstance in a particular case is sufficiently aggravating to justify the death penalty. The absence of "sufficient aggravation", for example a non-violent felony under Section 9711(d)(6), or a very old prior capital offense, Section 9711(d)(10), is just as much a "factor which may call/or a less severe penalty" as is any mitigating circumstance.

The Supreme Court has recognized the requirement of discretion in imposing the death penalty in a variety of circumstances. In Gregg vs. Georgia, supra, the Supreme Court approved a death penalty sentencing scheme in which the sentence of death may be imposed only if the sentencing authority finds a specified statutory aggravating circumstance and then elects to in its discretion to impose the death penalty. 428 U.S. at 165-166. In Proffitt vs. Florida, 428 U.S. 242(1976), decided the same day as Gregg, the Supreme Court approved a Florida death

penalty scheme in which an advisory jury could ignore statutory aggravating circumstances and in which the sentencing judge was required to find that the statutory aggravating circumstances that exist are "sufficient," id. at 250, in deciding whether to impose the penalty of death. Thus, the implication is that jury discretion not to impose the death penalty is a constitutional necessity.

The controlling Supreme Court plurality has hinted strongly that the sentencing authority must be free to evaluate independently aggravating as well as mitigating circumstances. In Jurek vs. Texas, supra, Justice Stewart stated that the "individualized sentencing determination," to which the defendant is constitutionally entitled mandates jury discretion in evaluating all factors, both aggravating and mitigating:

> A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

428 U.S. at 271. The flaw in Section 9711's mandatory sentencing scheme is that it seeks to take from the jury consideration of why the death penalty should be imposed. The Pennsylvania Legislature itself has attempted to decide when the death penalty should be imposed.

C. THE DEATH PENALTY SENTENCING STATUTE, 42 PA. C.S.A. SECTION 9711, VIOLATES THE EIGHTH AMENDMENTS PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS BECAUSE THE STATUTE DEFINES AGGRAVATING CIRCUMSTANCES IN AN OVERBROAD AND ARBITRARY FASHION.

The Pennsylvania death penalty sentencing statute, 42 Pa.C.S.A. Section 9711, contains ten aggravating circumstances. Aggravating circumstances (d)(6) is defined as follows:

> The defendant committed a killing while in the perpetration of a felony.

Unlike the use of the word felony in the definition of murder of the second degree, felony is not limited in Section 9711 to any subclass of felonies in the Pennsylvania Crimes Code. In fact, during debate on Section 9711 before its passage by the

Pennsylvania State Senate, an amendment proposing to limit aggravating circumstances to robbery, rape, arson, burglary and kidnapping was defeated. See Commonwealth of Pennsylvania Legislative Journal, Senate, 162nd Session of the General Assembly, page 103, February 22, 1978. Thus, the word felony in Section 9711 is unambiguous and its literal construction should not be disregarded.

Further, defining killing while in the perpetration of any felony as an aggravating factor mandating the death penalty creates an arbitrary classification.

The United States Supreme Court has repeatedly emphasized that aggravating factors must be drawn in such a way as to avoid the arbitrary and capricious infliction of the death penalty. See, e.g., Gregg vs. Georgia, 428 at 189. Thus, the Supreme Court reversed the judgment of death in Godfrey vs. Georgia, 446 U.S. 420 (1980) because under the circumstances of that case, (a shotgun double killing) (t)here (w)as no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 428. The aggravating factor at issue in Godfrey, that the killing be "outrageously or wantonly vile, horrible or inhuman in that it involved torture, deprevity or mind or an aggravated battery to the victim," had not been interpreted with sufficient narrowness so as to isolate a class of murderers for whom the death penalty is appropriate.

Godfrey requires that aggravating circumstances in a death penalty statute identify a unique individual, one whose acts or background are different from those "of any person guilty of murder," 446 U.S. at 433, so that the "decision to impose the death sentence be, and appear to be, based on reason." Id. (quoting Gardner vs. Florida, 430 U.S. 349 (1977).

It is clear that the (d)(6) does not restrict the death penalty to the most deplorable murders. Since the factor applies when a first degree murder is committed while in the perpetration of any felony, it renders murder during the theft of $2000 or an automobile automatically captial. Id. It is

absurd to think that a killing during the course of such non-violent crimes as tampering with public records, 18 PA C.S.A. Section 4911, or willful use of the contents of an intercepted communication, 18 PA C.S.A. Section 5703, or advertising an interception device, 18 Pa. C.S.A. Section 5705, should always be considered capital. All first degree murder is reprehensible of course, but Godfrey does not permit Pennsylvania to be this arbitrary in its selection of who is appropriate for death and who is not. Although many states consider the commission of various dangerous felonies to be an aggravating factor, see E.G., Jurek vs. Texas, supra (kidnapping, burglary, robbery, rape or arson), research has not revealed a single state that considers theft or other non-violent crimes to be aggravating. Such murders do not "Stand out above the norm of first degree murders" and may not therefore be selected arbitrarily for death. This deficiency is all the more serious because the Pennsylvania scheme makes the death penalty mandatory once any aggravating factor is found, unless the defendant proves mitigation.

Aggravating circumstances (d)(6) also is unconstitutional under Godfrey, because, potentially, the factor applies in every case of first degree murder. Because the factor applies to every felony, it appears to apply to a killing committed while in the perpetration of aggravated assault. See 18 Pa. C.S.A. Section 2702. Since aggravated assault, as a felony, includes intentionally causing serious bodily injury, see 18 PA C.S.A. Section 2702(a)(1), it is always perpetrated upon the victim of a murder of the first degree. Obviously, an aggravating factor that always applies does not select rationally those murderers most deserving of death, as Godfrey requires.

Therefore, for the reasons set forth above, defendant contends that 42 Pa. C.S.A. 9711, the Pennsylvania death penalty sentencing statute is unconstitutional in that it provides a mandator imposition of death, thereby depriving the jury of its right to determine a sentence by the exercise of sufficient discretion.

V. WHETHER THE PENNSYLVANIA SUPREME COURT ERRED IN ITS INTERPRETATION OF THE AGGRAVATING CIRCUMSTANCES IN THIS CASE BY RULING THAT THE PENNSYLVANIA DEATH PENALTY STATUTE DID NOT PERMIT AS A CIRCUMSTANCE FOR CONSIDERATION, SYMPATHY FOR THE ACTOR, THEREBY MAKING THE PENNSYLVANIA DEATH PENALTY STATUTE UNCONSTITUTIONAL?

ANSWER: YES.

The Pennsylvania Supreme Court's interpretation of the Pennsylvania Death Penalty Sentencing Statute renders the statute unconstitutional. During the sentencing phase of this case, the trial court instructed the jury,

> "Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision--into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. There is sympathy on both sides of that issue. Sympathy is not an aggravating circumstance; it is not a mitigating circumstance." (N.T. 1706)

Post trial motions were filed alleging this error. Also, during the prosecution's statement to the jury he stated that sympathy was not a mitigating factor for consideration.

The Pennsylvania Supreme Court agreed with the trial court and the prosecutor by stating:

> "It is clear from reading this argument as a whole that the prosecutor was seeking to remind the jury that sympathy was not a proper consideration, but that if they were inclined to be sympathetic they should temper their sympathy (This in fact was the essence of the trial court's instruction that sympathy was not a factor to be considered in the jury's deliberations, that there was sympathy on both sides of the case. (N.T.P. 1706) This was not an improper argument for the prosecutor to have made." Pg. 29 of Pa.S.Ct. Opinion.

In essence, the Court's condonation of the trial court's instructions and the prosecutors arguments mean that the Pennsylvania Death Penalty Statute does not permit sympathy, or mercy, as a mitigating circumstance.

This interpretation makes the Pennsylvania Death Penalty Statute unconstitutional. In Lockett vs. Ohio, 438 U.S. 586 (1978), the United States Supreme Court ruled that undue limitation by a death penalty statute insofar as mitigating circumstances are concerned are in violation of an individual's constitutional rights. In that case, only limited mitigating circumstances were to be

effect at the time. In Lockett, the Supreme Court cited Williams vs. Oklahoma, 358 U.S. at 585, another capital case, stating that

> "[i]n discharging his duty of imposing a proper sentence, the sentencing judge is authorized if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." (Emphasis added).

In conclusion the Court in Lockett stated: "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." 438 U.S. 608.

In Eddings vs. Oklahoma, 102 S.Ct. 869 (1982), the United States Supreme Court expanded the Lockett rationale in death penalty cases wherein it was decided that the sentencer is required "to listen" to any mitigating evidence presented by the defendant. Id. at 876 n. 10. In Eddings the Court cited Gregg vs. Georgia, 428 U.S. 153 (1976) stating:

> "By its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider "any mitigating circumstances", the Georgia statute properly confined and directed the jury's attention..." Id at 197.

The Eddings Court went on to say:

> "We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

As pointed out in Eddings, the Pennsylvania Supreme Court's approval of the trial court's instruction and the prosecutor's arguments that sympathy is not a mitigating circumstance, and therefore, not for the jury's consideration, makes the Pennsylvania Death Penalty Statute unconstitutional.

The United States Supreme Court in Washington vs. Bartholomew, 82-1857 recently vacated the judgment and remanded the case back to the Supreme Court of Washington for further consideration in light of the Zant vs. Stephens, 462 U.S._____ (1983). In Bartholomew the question raised was whether evidence should be admissible at the penalty phase, where the state law states that the jury may receive "any relevant evidence" and may consider "any relevant factors" in reaching its decision on penalty, Eighth and Fouteenth Amendments. In Bartholomew relevant adverse evidence could have been admissible at the penalty phase, but was not.

The Pennsylvania statute defines admissible mitigating circumstances along the lines of the Lockett character-record-offense formula. Pa.C.S.A. 18 § 1311 (3) mitigating circumstances. --Mitigating circumstances shall include the following: (8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense. But this formula fails to guarantee consideration of all factors which may call for a less severe penalty. In the first place, the character-record-offense formula is too restrictive. In the second place the Court has refused to create any standard by which to judge the relevance of proffered mitigating evidence and argument. Finally, the insistence upon a reason for mitigation is not a justifiable limitation upon sentencer discretion to return a life sentence. Because the concept of relevant mitigating circumstances is so flawed, requiring death unless relevant mitigating circumstances are found - - the essence of the Pennsylvania mandatory scheme - - fails to satisfy the United States Supreme Court's insistence upon a reliable death penalty sentencing system.

CONCLUSION

WHEREFORE, the defendant respectfully requests by and through his counsle, Public Defenders Office of Westmoreland County, Pennsylvania, respectfully requests that this Honorable court to grant the Petition for C ertiorari.

Respectfully submitted,

OFFICE OF THE PUBLIC DEFENDER

APPENDIX A

42 PA C.S.A. § 9711 OF THE COMMONWEALTH OF PENNSYLVANIA DEATH PENALTY SENTENCING STATUTE

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

> (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(d) Aggravating circumstances. - Aggravating circumstances shall be limited to the following:

(6) The defendant committed a killing while in the perpetration of a felony.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 37 W.D. Appeal Dkt., 1982
	:	Review of Death Sentence
v.	:	imposed by the Court of Common Pleas, Criminal Division, of Westmoreland County, Pennsylvania
MICHAEL J. TRAVAGLIA, Appellant	:	at No. 684 C of 1980, by Order dated June 4, 1982

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 26 W.D. Appeal Dkt., 1982
	:	Review of Death Sentence
v.	:	imposed by the Court of Common Pleas, Criminal Division, of Westmoreland County, Pennsylvania
JOHN CHARLES LESKO, Appellant	:	at No. 681 C 1980, by Order dated April 23, 1982

Consolidated by Order of Court September 27, 1982

ARGUED: March 10, 1983

CONCURRING OPINION

NIX, J. FILED: SEPTEMBER 29, 1983

I am fully in accord with the majority's affirmance of the verdicts of guilt in these appeals. My concern is directed to the majority's disposition of the objection to the allowance into evidence as an aggravating circumstance of the appellants' guilty pleas to the homicide charges in Indiana County (the William C. Nicholls killing). The majority focused its analysis upon whether the term "convicted" as used in section 9711(d)(10),

42 Pa. C.S. § 9711(d)(10), requires the imposition of sentence before such evidence can be admissible for this purpose.(1) In my judgment the issue raised is the finality of the conviction that is being offered as an aggravating circumstance. Where as here there have been challenges to the pleas entered in Indiana County,(2) I am convinced that section 9711(d)(10) must be interpreted as providing for review by this Court of those claims prior to the execution of the judgments of sentence of death affirmed by the Court today. I therefore join in the Court's

---

(1) Section 9711(d)(10) provides:

> (d) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (10) The defendant has been convicted of another Federal or State offense, commited either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(2) Appellant Travaglia filed a motion to withdraw his guilty plea to the Indiana County charge on January 23, 1981, during the trial of the instant case. That motion was denied on April 30, 1981 and Travaglia was sentenced to a term of life imprisonment. There is no indication in the record whether an appeal was taken from that judgment of sentence.

Appellant Lesko initially filed a motion to withdraw his guilty plea in the Indiana County case on December 3, 1980, prior to the trial in Westmoreland County, and filed an amended motion to withdraw on April 13, 1981. His motion, as amended, was denied on June 5, 1981. Lesko's challenge to that denial was rejected, and he was sentenced on July 17, 1981 to a term of life imprisonment. Lesko appealed to the Superior Court, which transferred the appeal to this Court. In Commonwealth v. Lesko, ___ Pa. ___, ___ A.2d ___ (J-72; filed _____), this Court affirmed the judgment of sentence. Thus as to Lesko my concern expressed here is satisfied.

mandate today with the caveat that the death penalty will be carried out only after a review of those complaints by this Court and only if after such review it is determined that the pleas were voluntarily and knowingly entered and the request for withdrawal was properly refused.

In Gregg v. Georgia, 428 U.S. 153 (1976), the United States Supreme Court painstakingly stressed the importance of the sentence-review function to be undertaken by the state's highest tribunal where the death penalty has been imposed. As noted by that Court in Zant v. Stephens, __ U.S. __, __, 77 L.Ed. 2d 235, 255 (1983): "[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." Surely an attack upon the validity of a guilty plea that has been used as the basis for a finding of an aggravating circumstance constitutes the type of contention that must be reviewed before the execution of the capital sentence may be allowed.

An interpretation of section 9711(d)(10) which provides for such a final review by this Court of a challenge of this nature is also dictated by the law of this Commonwealth. Our Constitution mandates a right of appeal in all cases. Pa. Const. art. V, §9; see Section 5105 of the Judicial Code, 42 Pa. C.S. §5105. Moreover, our case law has recognized the qualitative

difference between death and any other permissible form of punishment by relaxing rules of waiver which would otherwise preclude review of the merits of claims where the death sentence has been imposed. See Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d 937 (1982), cert. denied sub nom. Zettlemoyer v. Pennsylvania, 103 S.Ct. 2444 (1983); Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). In light of such precedent, it would clearly create an anomaly to foreclose a challenge upon the validity of a plea of guilt where that plea constitutes the aggravating circumstance upon which the death sentence is predicated.

It must be recognized that the validity of each aggravating circumstance is an important consideration even where there may be more than one aggravating circumstance upon which the jury could have reached its decision. Pennsylvania's death penalty statute provides that where the jury finds the existence of both aggravating and mitigating circumstances the jury must then engage in a "weighing" process. If, after the weighing process, the jury determines that the aggravating circumstances outweigh the mitigating circumstances, it must return the death sentence. 42 Pa. C.S. § 9711(c)(iv). It is evident that this weighing process is squarely within the province of the jury and that a reviewing court cannot determine with any certainty the exact weight which the jury attached to each aggravating and

mitigating circumstance.(3) In a case involving a decision as important as life and death we are not in a position to speculate about what decision the jury might have reached had it not considered one particular aggravating circumstance. Therefore, if the validity of even one aggravating circumstance is in dispute,(4) the death sentence should not be executed until the resolution of that dispute has become final.

Moreover, in view of our statutory responsibility to thoroughly review the record in death penalty cases, the resolution of any such dispute within the jurisdiction of this

(3) See Williams v. State. 274 Ark. 9, 621 S.W. 2d 686 (1982), cert. denied, 103 S.Ct. 460 (1983); Elledge v. State, 346 S.2d 998 (Fla. 1977); State v. Irwin, 304 N.C. 93, 282 S.E. 2d 439 (1981); State v. Moore, 614 S.W. 2d. 348 (1981), cert. denied sub nom. Moore v. Tenn., 454 U.S. 970 (1981); Hopkinson v. State, 632 P.2d 79 (Wyo. 1981), cert. denied sub nom. Hopkinson v. Wyoming, 455 U.S. 922 (1982).

(4) In the case of Zant v. Stephens, __ U.S. __, 77 L. Ed 2d 235 (1983), the U.S. Supreme Court held that under a state statute which did not require this weighing process, and where no suggestion is made that the presence of more than one aggravating circumstance should be given special weight, the subsequent invalidity of one of the aggravating circumstances does not invalidate the death sentence. The court in Zant stated the following:

> [W]e note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

Id. at __, 77 L. Ed. 2d at 258.

Commonwealth must be made by this Court.(5) Such disputes need not be decided within the context of the death penalty appeal; for example, appellant Lesko's guilty plea challenge, lodged initially in the Superior Court, was decided by this Court in a separately briefed and argued appeal.(6) However, where an appeal which has bearing on the validity of an aggravating circumstance relied upon in arriving at the death sentence is pending in another court of this Commonwealth at the time that sentence is reviewed by this Court, at least that portion of such appeal which affects the efficacy of the aggravating circumstance should be certified to this Court for disposition. Where a proceeding which has given rise to a finding of an aggravating circumstance is at the pre-sentencing stage, a direct appeal to this Court should be permitted upon sentencing. Until we have disposed of such related appeals this Court's statutorily mandated review of the death sentence is not complete, and execution of sentence should be stayed.

---

(5) Where an aggravating circumstance such as a conviction in the court of another state or in federal court is at issue, such a dispute will be considered resolved when passed upon the highest court of that jurisdiction.

(6) See footnote (2), supra. As noted in that footnote, the status of appellant Travaglia's guilty plea remains to be established. In light of this Court's pronouncement in Commonwealth v. Zettlemoyer, ___ Pa. ___, 454 A.2d 937 (1982), cert. denied sub nom. Zettlemoyer v. Pennsylvania, 103 S.Ct. 2144 (1983); Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978), a subsequent challenge to the validity of that plea may not be assumed to be waived.

[J-73-1983]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 37 W. D. Appeal Dkt. 1982
v.	:	Review of Death Sentence imposed by the Court of Common Pleas, Criminal Div Westmoreland County, Pennsylvania
MICHAEL J. TRAVAGLIA, Appellant	:	at No. 684C of 1980, by Order dated June 4, 1982

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 26 W. D. Appeal Dkt., 1982
v.	:	Review of Death Sentence imposed by the Court of Common Pleas, Criminal Div Westmoreland County, Pennsylvania
JOHN CHARLES LESKO, Appellant	:	at No. 681 C 1980, by Order dated April 23, 1982.
	:	Consolidated by Order of Court September 27, 1982
	:	ARGUED: March 10, 1983

DISSENTING OPINION

ROBERTS, C. J. FILED: SEPTEMBER 29, 1983

Because appellants are presently represented by the same counsel who represented them at trial and at the death penalty hearing, there has been no meaningful inquiry into whether appellants have been afforded their constitutional right to the effective assistance of counsel. In the absence of such an inquiry, the reasons for counsel's strategy, which do not appear of record, cannot be known, and it cannot be determined whether

there existed evidence which should have been presented by counsel but was not.

Accordingly, the record should be remanded for the appointment of new counsel, who would be obliged to submit a petition to the court of common pleas addressing the effectiveness of trial counsel. As previously stated, "[u]ntil a hearing on counsel's effectiveness has been held, this Court cannot fairly state that it has discharged its statutory duty to provide a thorough review of the judgment[s] of sentence of death." Commonwealth v. Zettlemoyer, ___Pa.___,____, 454 A.2d 937, 971 (1982) (Roberts, J., joined by O'Brien, C.J.,dissenting).

DEC 20 1983

The Supreme Court of Pennsylvania
Western District

CARL RICE, ESQ
PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
PITTSBURGH, PA.
15219

December 15, 1983

Dante G. Bertani, Esquire
Public Defender
302 Court House Square
Greensburg, Pennsylania 15601

In Re: Commonwealth of Pennsylvania v. Michael Travaglia
No. 37 W.D. Appeal Docket, 1982

Dear Mr. Bertani:

The Court has entered the following order on your Application for Reargument in the above matter:

"ORDER OF COURT

December 14, 1983

Application for Reargument denied.

PER CURIAM"

Very truly yours,

Carl Rice

Carl Rice, Esq.,
Prothonotary

CR/djp

cc: John Driscoll, Esquire
District Attorney
Court House Square
Greensburg, Pennsylvania 15601

Honorable Gilfert M. Mihalich
Court of Common Pleas
Court House Square
Greensburg, Pennsylvania 15601

APPENDIX "F"

83-6260

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL J. TRAVAGLIA)
)
VS.) No.
)
COMMONWEALTH OF PENNSYLVANIA)

ORIGINAL

MOTION FOR DEFENDANT TO PROCEED IN FORMA PAUPERIS

AND NOW comes the defendant, Michael J. Travaglia, by and through his counsel, Public Defenders Office of Westmoreland County and moves the Supreme Court of the United States to allow the defendant leave to proceed in forma pauperis on his petition for a Writ of Certiorai from the Supreme Court of Pennsylvania to the Supreme Court of the United States.

In Support of this Motion, the defendant attaches his Affidavit in Support of the Petition for Certiorai.

Respectfully submitted,

OFFICE OF THE PUBLIC DEFENDER

Frank J. Bustard

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL J. TRAVAGLIA)
)
)
VS.) No. _____
) October Term, 1983
)
COMMONWEALTH OF PENNSYLVANIA)

AFFIDAVIT IN SUPPORT OF PETITION FOR CERTIORAI IN THE SUPREME COURT OF THE UNITED STATES FOR PERMISSION TO PROCEED IN FORMA PAUPERIS

I, Michael J. Travaglia being first duly sworn, depose and say that I am the defendant in the above-entitled case, that in support of my Petition for Certiorai to the Supreme Court of Pennsylvania without being required to prepay fees, costs or give security thereof, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

See "Questions Present for Review" (1st Page after Cover in the attached PETITION FOR CERTIORAI)

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed? Answer NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Not Applicable

b. If the answer is none, state the date of your last employment and the amount of the salary and wages per month which you received.

Date last employment November, 1979

Name and Address Westinghouse Airbrake, Wilmerding, PA

Monthly earnings $1,000

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

I receive idle pay From SCI-Pittsburgh, (Prison).

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

All I get is about $10 per month from the Institution, and $30 to $50 per month from friends.

3. Do you own any cash or checking or savings account?

NO.

a. If the answer is yes, state the total value of the items owned.

Not Applicable.

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property(excluding ordinary household furnishings and clothing)?

None.

a. If the answer is yes, describe the property and state it approximate value.

Not Applicable.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties of perjury.

Michael J. Travaglia

Michael J. Travaglia

Sworn and subscribed to

this 11th day of February, 1984

William B. Richardson

WILLIAM B. RICHARDSON
Commonwealth of PA
Westmoreland County
Commission Expires March 9, 1985

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-6260

MICHAEL JAY TRAVAGLIA, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA and
LeROY S. ZIMMERMAN, ATTORNEY GENERAL
OF PENNSYLVANIA, Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JOHN J. DRISCOLL, District Attorney
201 Courthouse Square
Greensburg, PA 15601

*TIMOTHY J. GEARY, Esquire
158 Grant Avenue
Vandergrift, PA 15690
(412) 568-3694

*Special Counsel to District Attorney

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42 Pa. C.S.A. §9711	10,14,17

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COUNTER-STATEMENT OF ISSUES

I. JURY SELECTION WAS PROPER AND VENIREMAN EXCLUDED FOR OPPOSITION TO THE DEATH PENALTY WERE PROPERLY EXCISED PURSUANT TO THE TEST IN WITHERSPOON V. ILLINOIS, 391 U.S. 519 (1968), AND ITS PROGENY.

II. THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES OF THE DEFENDANT WAS RELEVANT AND WAS NOT VIOLATIVE OF DEFENDANT'S RIGHT TO DUE PROCESS.

III. THE DEFENDANT'S PLEA OF GUILTY TO MURDER IN THE SECOND DEGREE IN INDIANA COUNTY, PENNSYLVANIA CONSTITUTED A CONVICTION AND WAS PROPERLY INTRODUCED IN EVIDENCE AS AN AGGRAVATING CIRCUMSTANCE.

IV. NEITHER THE REQUIREMENT THAT THE DEFENDANT PROVE MITIGATING CIRCUMSTANCES BY A PREPONDERANCE OF THE EVIDENCE NOR THE REQUIREMENT THAT THE JURY MUST SENTENCE THE DEFENDANT TO DEATH UPON A FINDING OF ONE AGGRAVATING CIRCUMSTANCE AND NO MITIGATING CIRCUMSTANCES IS IN VIOLATION OF LOCKETT V. OHIO, 438 U.S. 586 (1977).

V. SYMPATHY IS NOT A MITIGATING FACTOR UNDER THE PENNSYLVANIA DEATH PENALTY STATUTE NOR DOES LOCKETT V. OHIO, 438 U.S. 586 REQUIRE OR EVEN SUGGEST SUCH A RESULT.

I. JURY SELECTION WAS PROPER AND VENIREMAN EXCLUDED FOR OPPOSITION TO THE DEATH PENALTY WERE PROPERLY EXCISED PURSUANT TO THE TEST IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), AND ITS PROGENY.

It would be impossible, without a lengthy review of the entire voir dire transcript to understand the great lengths to which the trial judge went in assuring that the prospective jurors understood the questions that were asked, especially those questions relating to the death penalty. In fact, the trial judge made three separate efforts to select a fair and impartial jury. Initially, the trial judge attempted on June 2, 1980 to select a jury in Westmoreland County. This effort ended in a mistrial at the request of the defendant because of the extensive pre-trial publicity.

The trial judge attempted again, between September 3 and September 12, 1980 in Dauphin County to select a jury pursuant to Act 25 of 1980. Over 100 jurors were examined during seven court days. This attempt also was terminated by a mistrial at the defendant's request because a newspaper article, which alluded to the fact that the defendant had been charged in four murders was circulated in the jury assembly room.

The third effort to attempt a jury in this case was successful. The jury selection process took place in Reading, Pennsylvania, which is the County Seat of Berks County. It took twelve days beginning on January 5, 1981 and ending on January 19, 1981. 187 jurors were examined in order to select twelve jurors and four alternates.

At the time of the trial, the law in this Commonwealth in trials involving joint defendants provided that the defendants were entitled to a total of 20 peremptory challenges between them, and the Commonwealth was entitled to the total possessed by both defendant, viz: twenty. See Pennsylvania Rule of Criminal Procedure 1126(b) as the rule was in effect on January 5, 1981.

Irrespective of the law relative to peremptory challenges applicable at that time, the trial judge announced at the beginning of jury selection, that the Commonwealth would have a total of 20 peremptory challenges and each defendant would have twenty peremptory challenges. The bottom line to this ruling was that the Commonwealth would only have twenty peremptory challenges and the defendants would have a total of forty.

At the conclusion of the selection of the first twelve jurors (these were in fact the jurors that rendered the decision in this case, as there was no need to use any of the alternate jurors although four were selected and listened to testimony) the Commonwealth had exercised only nineteen peremptory challenges. Each of the defendants had utilized all twenty of their peremptory challenges. The fact that the Commonwealth did not use all of its peremptory challenges in selecting the first twelve jurors is relevant because if the trial judge had not granted the challenge for cause relative to Esther Kroh, the Commonwealth had an unused peremptory challenge available. The net effect would have been that the same jury would have been seated irrespective of the trial judge's ruling.

In order to ensure that the questioning of all the prospective jurors was conducted within constitutional limitation, the trial judge submitted a list of approved questions. These approved questions were reviewed by the Commonwealth's attorney and the defendant's attorney as well at the initial pre-trial conference conducted in May of 1980 before the first attempt to select a jury. It was agreed by all parties that the approved questions would set general parameters of the scope of each prospective juror and that any additional questions would have to be approved first by the Judge before they would be permitted to be asked on the record. The list of approved questions was admitted into

the record as Court Exhibt #1. Those approved questions which relate to capital punishment are as follows:

"16. Do you have any conscientious scruples against imposing the death penalty?

a. (An affirmative answer will not be sufficient to sustain a challenge for cause. If the juror answers in the affirmative, the juror should be asked the following question:

i. Are your feelings against the death penalty such that you would automatically vote against the imposition of such punishment irrespective of what evidence is presented and what law is given to you by the trial judge?

-or-

ii. ALTERNATIVE QUESTION: If in the trial of this case the evidence and the law establish that the death penalty should be imposed, could you participate in the imposition of the death penalty even though you have certain reserved feelings about the propriety of the death penalty?

ALTERNATE CAPITAL PUNISHMENT QUESTION:

16. Do you have any personal, moral or religious beliefs or convictions against capital punishment?

a. (If prospective juror answers yes:)

Are these beliefs or convictions so firm that you would automatically vote against the imposition of the death penalty irrespective of any evidence or law presented to you in this trial?"

A review of the above-cited questions will show that they incorporate the mandates and guidelines expressed by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968). A review of the three-volume jury selection transcript which covered 2247 pages will establish that in each and every instance, the trial judge scrupulously followed these guidelines; therefore, the defendant's general allegation that veniremen were excluded in violation of Witherspoon v. Illinois, supra. is without merit. The defendant further points specifically to Esther Kroh (the nineteenth prospective juror called)

and argues that her challenge for cause by the Commonwealth was granted by the Court in violation of the rule of Witherspoon v. Illinois, supra. The defendant's argument concerning the challenge of Esther Kroh is simply myopic. In order to determine whether or not Kroh was qualified to serve, it is necessary to consider her entire testimony (voir dire transcript at 253-264). The Court granted the challenge for cause based on Mrs. Kroh's entire testimony and her demeanor while testifying.

> "Q. THE COURT: Motion for challenge for cause is granted. Under the situation as observed and determined by the Court, this juror is not qualified to serve."
>
> (Voir Dire Transcript p. 262).

The challenge for cause which was granted by the Court was proper for two reasons. First, Mrs. Kroh's inconsistent answers indicate that she either violated her oath as a juror or was unable to understand the questions that were asked. In either case, she was not qualified to serve as a juror because all jurors must abide by their oaths; each juror must be willing to follow the law presented by the trial judge, and each juror must be able to follow the law presented by the trial judge. A juror must assume her duty with such impartiality and comprehension that she will be able to understand all the testimony and instructions so that she could intelligently decide not only why and when a death sentence should not be imposed, but also why and when it should be imposed.

Mr. Kroh indicated initially that she had no conscientious scruples against the death penalty and could vote either way on the quesion of sentencing depending on the evidence.

> "Q. Do you have any conscientious scruples against imposing the death penalty?

A. No sir.

(Voir Dire Transcript p. 255).

. . .

A. Well, I think I would vote either way.

Q. THE COURT: You're saying you could vote either way depending on the evidence?

A. Yes."

(Voir Dire Transcript p. 256).

On examination by defense counsel, however, Mrs. Kroh's answer changed markedly when she answered a question about the death penalty as follows:

"A. No sir, I'm opposed to the death penalty."

(Voir Dire Transcirpt p. 260).

Kroh was then accepted by counsel for the co-defendant Travaglia after which the following colloquy occurred between Kroh and the Court:

"Q. THE COURT: Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespective of what evidence was given to you?

A. Well, I am opposed, yes."

(Voir Dire Transcript p. 261).

This declaration by Mrs. Kroh disqualifies her as a juror in this case. The law of the Commonwealth of Pennsylvania provides for the imposition of the death penalty under certain circumstances. Consequently, her declaration indicates she would violate the law of the Commonwealth and the oath of a juror to base her determination on the eivdence and the law. The attorney for the defendant contends that Mrs. Kroh's answer was ambiguous. The trial court had the opportunity to hear the emphasis placed on the words; he had the opportunity to consider pauses between the words, and he had the

opportunity to observe Mrs. Kroh when she testified. These of course, are not discernible from the cold record. In fact, the trial judge indicated this on page 15 of his opinion in response to the defendant's post-trial motions.

The exclusion of Mrs. Kroh does not violate the mandates established by Witherspoon v. Illinois, supra. Witherspoon does not prevent the exclusion of veniremen who would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial or those whose attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. In order to properly evaluate the trial court's decision, of course, it is necessary to review Mrs. Kroh's testimony.

In order to juxtapose the testimony with testimony of other witnesses to determine whether or not the trial court was correct, the Commonwealth points to the testimony of prospective juror #121, Chester Spayd, Sr. (Voir Dire Transcript pp. 1480-1486). There, the cold record appears to demonstrate without question that Mr. Spayd was unqualified under the test in Witherspoon v. Illinois, supra. (See Voir Dire Transcript p. 1485). However, a colloquy between the trial court and Mr. Spayd revealed that in certain situations, he might vote for the death penalty. The trial court then denied the Commonwealth's challenge for cause.

The defendant cites no other specific juror nor will a review of the entire voir dire transcript reveal a single instance where any of the other jurors challenged for cause by the Commonwealth on the death penalty issue were not clear and unequivocal in their responses as is required in Witherspoon and its progeny.

II. THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES OF THE DEFENDANT WAS RELEVANT AND WAS NOT VIOLATIVE OF DEFENDANT'S RIGHT TO DUE PROCESS.

Defendant complains that his right to due process has been violated by virtue f the application of a rule of evidence under state law specifically relevance.

A.) Waiver

The defendant's objection at trial and before the Supreme Court of Pennsylvania was in the form of an evidentiary objection only and it was addressed in that fashion by both courts below. Therefore the constitutional argument presented here has been waived.

B.) The objection raised by the defendant is not of constitutional dimensions in that it is merely the application of a long-standing state law of evidence to wit relevance in which evidence of other criminal activity or conduct of the defendant, while generally inadmissible to prove his commission of the crime for which he is being charged is nevertheless admissible, where it is relevant to prove (1) motive, (2) intent, (3) common scheme or plan, (4) the identity of the accused as the perpetrator or the absence of mistake or accident Commonwealth v. Styles, 494 Pa. 524, 431 A.2d 978 (1981). So long as the probative value of the testimony outweighs its prejudicial effect upon the jury, it is admissible.

There is no argument that in the defendant's case he was treated differently than others similarly situated nor does he argue that his was a change from prior law. The argument is simply that the court erred in applying its own rule of evidence which it did not. See EG Fed.R.Evid. 403 and 404(b) which are nearly identical to the Pennsylvania rule.

III. THE DEFENDANT'S PLEA OF GUILTY TO MURDER IN THE SECOND DEGREE IN INDIANA COUNTY, PENNSYLVANIA CONSTITUTED A CONVICTION AND WAS PROPERLY INTRODUCED IN EVIDENCE AS AN AGGRAVATING CIRCUMSTANCE.

Defendant complains that his right to due process has been violated by virtue of a change in Pennsylvania law which only applies to defendants charged with a capital crime.

A.) Waiver

The defendant's objection at trial and before the Supreme Court of Pennsylvania was to the introduction of certain evidence, but the objection was never couched in constitutional terms. It is being offered here in this light for the first time and therefore the constitutional argument has been waived.

B.) Even if there has been no waiver of the issue raised by the defendant there has been no attempt to change existing law as the defendant contends. It has long been the law in this Commonwealth that a plea of guilty when accepted and entered by the Court is equivalent to a conviction and a verdict of guilty by jury. Commonwealth ex rel. Hough v. Maroney, 425 Pa. 411, 229 A.2d 913 (1967); Commonwealth ex rel. Saddler v. Maroney, 422 Pa. 13, 220 A.2d 846 (1966); Commonwealth ex rel. Dandy v. Banmiller, 397 Pa. 312, 155 A.2d 97 (1959). See also, United States ex rel. Crosby v. Brierly, 404 F.2d 790 (1968) where the Court in citing Kercheval v. United States, 274 U.S. at 223, 47 S.Ct. at 583 held that:

> "A guilty plea . . . is itself a conviction, it is conclusive as a verdict . . . "; Commonwealth ex rel. Crosby v. Rundle, 415 Pa. 81, 202 A.2d 299, cert. den. 379 U.S.976, 13 L.Ed.2d 567 (1964).

The statute in question reads as follows:

> ". . . The defendant has been convicted of another Federal or

> state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the offense. . ." 42 Pa. C.S.A. §9711(d)(10).

The clear import of this aggravating circumstance is to make the commission of multiple serious crimes an aggravating circumstance. Since under Pennsylvania law a criminal defendant has a right to be tried within 180 days of the filing of a criminal complaint against him (see Pa.R.Crim.P. 1100), a holding that "convicted" means a final judgment of sentence removes the threat of the most serious aggravating circumstance in a situation involving, for example, multiple homicides, such as was the case here. Clearly, because of the time from the end of trial until a final judgment of sentence, there is no other way that an offense "committed either before or at the time of the offense at issue . . ." could be utilized as an aggravating circumstance if any other interpretation is given to the word "convicted" as it appears in aggravating circumstance number 10. (42 Pa. C.S.A. 9711(d)(10)).

The plea of guilty to the Nichols murder in Indiana County meets the criteria and requirements as specified in aggravating circumstance number 10 quoted above. (42 Pa. C.S.A. §9711(d)(10))

1. The Nichols murder was committed by the defendant before the Miller murder;
2. At the time of the Miller trial, the defendant had plead guilty to second degree murder for the killing of Nichols;
3. A sentence of life imprisonment was impossible at the time of defendant's plea to second degree murder for killing Nichols. In fact, life imprisonment is the only sentence that could have been imposed in the second degree murder plea of guilty.

IV. NEITHER THE REQUIREMENT THAT THE DEFENDANT PROVE MITIGATING CIRCUMSTANCES BY A PREPONDERANCE OF THE EVIDENCE NOR THE REQUIREMENT THAT THE JURY MUST SENTENCE THE DEFENDANT TO DEATH UPON A FINDING OF ONE AGGRAVATING CIRCUMSTANCE AND NO MITIGATING CIRCUMSTANCES IS IN VIOLATION OF LOCKETT V. OHIO, 438 U.S. 586 (1977).

A.) The specific issue raised by the defendant was addressed by the Supreme Court of the United States in the case of Keith Zettlemoyer v. The Commonwealth of Pennsylvania, 82-6514 and on May 31, 1983 the Court denied Certiorari.

B.) The Pennsylvania Death Penalty Statute 42 Pa. C.S.A. §9711 does require that the jury's "verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstances, or one or more aggravating circumstances which outweigh any mitigating circumstances". This is clearly a mandatory rule, but it in no way prevents the jury from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense offered in mitigation. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 98 S.Ct. 2954 (1978). The Court in Lockett v. Ohio, supra. found the Ohio Death Penalty Statute infirm under the Eighth and Fourteenth Amendments of the Federal Constitution because the Ohio Statute did not permit evidence relative to the defendant's character and record, and to circumstances of the offense (e.g. the fact that the defendant's participation in the homicidal act was relatively minor) unless they were in some way directly related to one of three enumerated mitigating circumstances. Lockett v. Ohio, at 438 U.S. 608. All of the cases cited by the defendant involved situations where mandatory death penalty statutes have been stricken down by the Supreme Court. Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976); Roberts v. Lousiana, 428 U.S. 906, 49 L.Ed.2d 1213, 96 S.Ct. 3214 reh. den. 429 U.S. 890,

50 L.Ed.2d 174, 97 S.Ct. 248 (1976); Roberts v. Louisiana, 431 U.S. 633, 52 L.Ed.2d 637, 97 S.Ct. 1993 (1977). Each of the Statutes set forth in the cases cited above merely define a specific crime or crimes and then made the death sentence mandatory. These statutes did not provide any standards or guidelines for the jury to follow in arriving at a proper sentence. There is no case which says any mandatory death sentence is unconstitutional, certainly Lockett v. Ohio, supra., does not so hold.

It is the province of the Legislature to determine what circumstances may be considered in mitigation during a sentencing hearing. Patterson v. New York, 423 U.S. 198, 53 L.Ed.2d 284 (1977); Lockett v. Ohio, supra. In Pennsylvania, the Legislature has set forth in detail various mitigating factors and it has these factors which make the Pennsylvania death penalty statute entirely different from those statutes which has been declared unconstitutional. The challenged Pennsylvania statute lists the following mitigating circumstances:

1. The defendant has no significant history of prior criminal convictions.

2. The defendant was under the influence of extreme mental or emotional disturbance.

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

4. The age of the defendant at the time of the crime.

5. The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under §309 (relating to duress), or acted under the substantial domination of another person.

6. The victim was a participant in the defendant's homicidal conduct or consented to the homicial acts.

7. The defendant's participation in the homicidal acts was relatively minor.

8. Any other evidence of mitigation concerning the character and record of the defendant in circumstances of his offense. See 42 Pa. C.S.A. §9711.

Not only does the Pennsylvania statute permit the jury to consider circumstances of the type which the Ohio statute made no provision for, (see Lockett, supra.) the Pennsylvania statute leaves within the sole province of the jury the weight to be given the mitigating circumstances, once they have been offered by the defendant. A Pennsylvania jury cannot impose the death sentence without first considering the aggravating and mitigating circumstances, including those which relate to the character and record of the defendant and the circumstances of the offense in question. Even more important, a Pennsylvania jury cannot impose a death sentence even under the mandatory aspects of the Pennsylvania statute without first finding that there were no mitigating circumstances. No death penalty statute similar to the current Pennsylvania statute has ever been determined to be violative of either the Eighth or Fourteenth Amendments of the Federal Constitution or the Pennsylvania Constitution, nor does the defendant cite any case so holding.

Finally, the defendant's argument concerning aggravating circumstance No. 6 " That the defendant committed a killing while in the perpetration of a felony" 42 Pa. C.P.A. §9711(a)(6) is irrelevant in light of this court's holding in Zant v. Stephens, ___U.S.___, 77 L.Ed.2d 235, 103 S.Ct.___ (1983) because no testimony was ever offered about this aggravating circumstance.

V. SYMPATHY IS NOT A MITIGATING FACTOR UNDER THE PENNSYLVANIA DEATH PENALTY STATUTE NOR DOES LOCKETT V. OHIO, 438 U.S. 586 REQUIRE OR EVEN SUGGEST SUCH A RESULT.

The defendant has redefined sympathy to be a mitigating factor which it is not. (See 42 Pa. C.A.A. §9711). At no time did the prosecutor or the trial court allude to the character witnesses offered by the defendant when discussing sympathy. Clearly the evidence offered by Michael Jay Travaglia from character witnesses was an attempt to establish the existence of mitigating factor No. 8 under the Pennsylvania Death Penalty Statute viz. any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense. See Pa. C.S.A. §9711(e)(8). This is required by Lockett v. Ohio, 438 U.S. 586 (1977).

The trial court's charge about sympathy

> Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision -- into a decision imposing the death sentence, or could improperly sway you against the decision imposing the death sentence. . . . Sympathy is not an aggravating circumstance; it is not a mitigating circumstance. [N.T. 1706].

and the reference in prosecutor's closing argument about sympathy

> "But I have a problem. Each one of you promised me, promised the judge, Mrs. Ambrose, Mr. Bertani, Mr. McCormick, Mr. Marsh and the defendants, when we started, that you would follow the law. You all promised that you wouldn't become a social activist. But I can't stop that. I can't stop you from walking out into that deliberation room after the judge charges you and saying to yourself, The Commonwealth has proved one or more aggravating circumstances, and there's no mitigating circumstances here at all, and the law says I must find these defendants and sentence them to death, but I won't do that, because I feel sympathy. And I also can't stop you from saying, well, I found one or more aggravating circumstances that have been proven beyond a reasonable doubt, and although I found mitigating circumstances, the

> aggravating circumstances outweigh them, and the law says that I must return a death penalty, but I won't, I'm going to show sympathy. I just can't stop you from doing that." [N.T. 1701].

were designed to take out of the case what the defendants had improperly put into it. This was a joint trial and both the defendant (Michael Jay Travaglia) and his co-defendant (John Charles Lesko) had been found guilty of murder in the first degree and the jury was hearing evidence in both cases.

Specifically the defendants themselves had attempted to cloud the issues by the following: Bernard Travaglia and Judith Travaglia, the parents of the defendant Michael Jay Travaglia both testified [N.T. 1594-1597] and both cried and sobbed in front of the jury; the final statement from Mrs. Travaglia being "... He's my son. I don't want him to die." [N.T. 1597] Mrs. Travaglia was extremely emotional, almost hysterical, at this point and that fact is reflected in the prosecutors closing argument:

> "You saw something yesterday afternoon which visibly shook every one of you. And if it hadn't, would have surprised me. And I feel that every one of you were filled with compassion. I was. But you're not here to decide this issue on sympathy. Sympathy is not a mitigating circumstance. When you think about sympathy, you have to feel and know that there are other people whose hearts have been heavy for a long time, since January 3, 1980. Consider the law, consider the evidence, and make a decision. [N.T. 1690].

Also the defendant's closing argument made reference to subjects that were not part of the jury's function as did the closing argument of his co-defendant. Both of these closing arguments relied on two basic premises: (1) the death penalty is inherently wrong and (2) the arousal of the jury's sympathy by inflamming them as to the nature of the death penalty as it is carried out:

Defendant Travaglia's Closing:

". . . If the killing of Michael Travaglia can bring back those people, then there would be a legitimate reason for killing Michael Travaglia. . . " [N.T. at 1677]

". . . two wrongs don't make a right. . . "[N.T. at 1697]

". . . other states don't have a death penalty - have they found out something more than we know . . . " [N.T. at 1680]

". . . thou shalt not kill. . . " [N.T. at 1683]

". . . some glorious day we're going to take Michael Travaglia out, and we're going to shave his head, we're going to put grease on his arms, we're going to strap him into an electric chair, and we're going to send all those volts through his body until his feet split open and his fingers split open, and he dies, and he's electrocuted. . . " [N.T. at 1678]

Defendant Lesko's Closing:

" . . . It's a death that is planned by the state for months, and its the kind of death that the condemned man waits for months to endure. Usually in terror. . . " [N.T. at 1665]

". . . And consider, with your knowledge of history, whether or not the death penalty was an instrument for the cure, the alleged cure of the social ills of the time which were many. That is expediency, not the law. . . " (emphasis added) [N.T. at 1666]

". . . Now, something else cured those social ills of the seventeenth and eighteenth centuries; it was not the death sentence. . . " [N.T. at 1667]

". . . if you return a verdict of death against John, you'll be saying the equivalent that we don't buy the doctrine that there is some good in every one of us that should be preserved, and if there is some good in someone it shouldn't make any difference. . . " [N.T. at 1672]

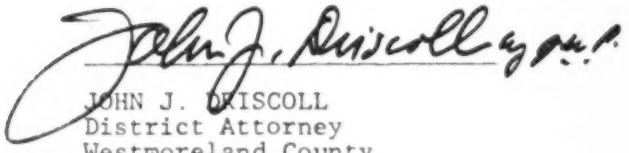
The testimony set forth above and the defendant's closing arguments were designed to arouse sympathy not to prove a mitigating circumstance. They have nothing whatsoever

to do with the character and record of the defendant nor the circumstances of his offense. 42 Pa. C.S.A. §9711(e)(8).

CONCLUSION

The Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,



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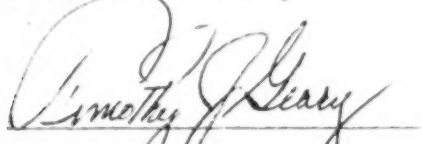

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